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No. 920

IN THE

Supreme Court of the United States

FEBRUARY TERM, 1965

On Appeal from the Supreme Court of the State of Ohio

JOHN CIESIELSKI,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

JURISDICTIONAL STATEMENT

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JOHN CIESIELSKI,

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JURISDICTIONAL STATEMENT

The appellant appeals from the judgment of the Supreme Court of Ohio denying an application for rehearing entered on December 9, 1964, to appeal from the decision of the Court of Appeals of Ohio, Seventh Appellate District, upholding the conviction of the appellant and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The decisions of the Supreme Court of the State of Ohio dismissing appellant's appeal on the grounds that no substantial constitutional question was involved; sustaining appellee's motion to dismiss the appeal as of right; dis-

missing appellant's motion for leave to appeal; and denying a rehearing application of appellant's case are printed in Appendix "A" hereto, *infra,* pages .. to ... The decisions of the Court of Appeals of Ohio, Seventh Appellate District, is printed in Appendix A hereto, *infra,* pages .. to ... Copies of the record in the trial court, the Court of Common Pleas of Columbiana County, are a part of the record in this case.

JURISDICTION

This action was brought under Sections 3719.20, and 2907.10, and this case originated in the Common Pleas Court of Columbiana County after prior arraignment in the Municipal Court of East Liverpool, Ohio. A verdict of conviction was rendered by a jury in the Common Pleas Court of Columbiana County, Ohio, and an appeal was properly perfected to the Court of Appeals in said Seventh Appellate District. The opinion of said Court of Appeals was issued on June 3, 1964. An appeal was further perfected to the Supreme Court of the State of Ohio but the said Supreme Court of Ohio did on Dec. 9, 1964, overrule the Motion for leave to appeal and the Motion to appeal as of right filed in behalf of the herein appellant. The jurisdiction of the Supreme Court of the United States to review this decision is conferred by Title 28, United States Code, Section 1257 (2)

QUESTION PRESENTED

Whether the constitutional requirement and guarantee of a speedy trial was had in this cause and made available to the appellant has been raised through all of the litigation in the subject case. The question is clearly one of Federal Constitutional Provision, and is clearly unincumbered by problems of state process or procedure. Specific juris-

diction to grant the relief requested by this appeal is provided in Title 28, United States Code, Section 2101 (f).

STATEMENT

The Defendant, John Ciesielski, was indicted by the April Term of the Columbiana County Grand Jury, said indictment being returned on the 16th day of September, 1960. He was indicted on two counts, Violation of Ohio Revised Code, Section 2907.10 (Burglary in an Uninhabited Dwelling or Other Building) and Violation of Ohio Revised Code, Section 3719.20 (Prohibitions-Narcotics).

Said acts to have been committed on the 19th day of June, 1960. The case being No. 7231 in the Common Pleas Court of Columbiana County.

That between the 19th day of June, 1960 and the date of indictment, while out on bond, the Defendant was arrested and charged in Federal Court, Pittsburgh, Pennsylvania, convicted and sentenced to the United States Penitentiary, Lewisburg, Pennsylvania. That during said confinement he was also charged by the State of Pennsylvania and tried during his confinement, being released by Federal authorities to stand trial, and convicted. Upon his release by Federal authorities, he served the sentence for the charge the State of Pennsylvania had sentenced him to. During his time of confinement in both the United States Penitentiary and in the Allegheny Workhouse, the prosecuting attorney of Columbiana County had placed detainers against him.

Upon his release from the Allegheny Workhouse, he was returned to Columbiana County and tried on the 30th day of July, 1963. The jury returned a finding of "Guilty" on both counts on the 31st day of July, 1963.

The Defendant was sentenced on the 16th day of September, 1963 to the Ohio Penitentiary as required by law on each sentence, the sentences to run concurrently.

The Defendant, during his confinement in the United States Penitentiary, wrote several requests to the prosecuting attorney of Columbiana County to be returned to Columbiana County from the United States Penitentiary in order that the matter then pending in the Common Pleas Court of Columbiana County against him be disposed of. The letters dating from September 28, 1960 to February 17, 1962 are set out in State's Exhibits 1 thru 7 and Defendant's Exhibits 1 thru 5.

The Defendant, on the 1st day of September, 1961, while in the United States Penitentiary, filed a Motion to Show Cause on Application for a Writ of Habeas Corpus Ad Prosequendum", to stand trial in Columbiana County. This was overruled on September 22, 1961. All of this being of no avail and the prosecuting attorney took no further steps to bring the Defendant before the Bar for a speedy trial, until his release from the Allegheny Workhouse.

The Defendant, on May 15, 1962, while still in the United States Penitentiary, filed a "Motion to Quash and Dismiss the Indictment". This Motion was repeated through counsel, this being the first time the Defendant had counsel in this matter, on the 19th day of June, 1963, and was overruled. This same Motion being repeated in full by counsel during trial and at the close of the case, but was overruled. It is from this denial of a speedy trial and other errors committed during the trial that the Defendant appealed.

On July 2, 1964, the Seventh District Court of Appeals affirmed the conviction under Ohio Revised Code, Section 2907.10 (Burglary in an Uninhabited Dwelling) and reversed the conviction under Ohio Revised Code, Section 3719.20.

It is from the affirmance of the conviction under Ohio Revised Code, Section 2907.10 that the Defendant now appeals.

The Defendant says that the delay of time of the trial from the return of the indictment on the 16th day of September, 1960 until the 30th day of July, 1963, was a denial of his right to a speedy trial under Article I, Section 10 of the Ohio Constitution and the Sixth Amendment of the United States Constitution. Although he was at all times incarcerated in the penitentiary of another sovereign, he did ask to be returned and tried under the indictments then pending against him in the Ohio Courts.

While the clause of speedy trial in the Constitution is not self-executing, the Defendant did request to be brought to trial, not once but several times, as will be shown by the letters written to the prosecuting attorney of Columbiana County.

Defendant's Exhibit II. Letter dated May 14, 1961.

> "Will you please bring me back to your Court and make final disposition of this case?"

Defendant's Exhibit III. Letter dated August 10, 1961.

> "I have to dispose of this charge regardless what the consequences may be."

Defendant's Exhibit V. Letter of United States Department of Justice dated October 25, 1961.

> "The prisoner has indicated he is anxious to stand trial on the charges pending in your jurisdiction."
> "Kindly advise us of any contemplated action in this regard."

State's Exhibit II. Letter dated July 12, 1961.

> "I wrote you again sometime in May and asked you if you would be kind enough to have me brought back to Court to dispose of the charge against me."

State's Exhibit III. Letter dated February 17, 1962.

"I asked the Bureau of Prison in Washington to make me available to you so that this case can be disposed of and permission was granted. If you will allow me to plead guilty to the charge, I will accept what punishment I receive."

"... and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed,..."

Ohio Constitution Article I, Section 10. Trial for Crimes—Witness

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Constitution of the United States Amendment VI

"It is well established under our law that the right to a speedy trial conferred by the Constitution is not self-executing. Affirmative action on the part of an accused in the nature of a demand to be tried is necessary.

"Thus, in order for an accused to procure his release on the basis of a denial of his right to a speedy trial, he must show affirmative action on his part to secure a speedy trial."

Partsch vs. Haskins, Supt. London Correctional Institution, 175 O. S. 139

"A person charged with crime cannot successfully assert that his right to a speedy trial has been invaded unless he asked for trial.

"Demand for speedy trial is essential to right.

"Where no demand for trial was made, Defendant cannot complain of delay."

State of Ohio vs. Knight, 32 O. O. 513

"A prosecuting attorney is responsible for presenting the state's case with earnestness and vigor, but he also must see that no conviction takes place except in

strict conformity with the law. He must be sure the accused is not deprived of any constitutional right or privileges."

23 A Corpus Juris Secundum, 78, Criminal Law Sec. 1081

There can be little doubt here that by reading the Defendant's letters as a whole to the prosecuting attorney, that there was a demand for trial. It must be remembered that the Defendant is a layman and at times the words used were "to dispose of the charge now pending against me". He may have also indicated to the prosecution that he wanted some type of consideration in this matter. However, taking all the letters as a whole, it cannot be said he was not making an effort to stand trial. He further wrote the United States Department of Justice to be released for trial and they not only seemed agreeable but wrote the prosecutor as to how he could get the Defendant released for trial.

The second issue under this matter is whether or not an accused in the penitentiary may demand a speedy trial. This matter has been before the Ohio courts many times and has been answered in the affirmative.

"A detainer or hold is an informal demand by one exercising public authority for the possession of a person already in lawful custody of another.

"Where more than one charge exists against an individual, it is necessary to dispose of all promptly by consolidation, if the facts permit; or, if consolidation is not possible, the defendant may be sentenced and returned from confinement to stand trial for the remaining offenses.

"Under a Constitutional provision guaranteeing to the accused a speedy trial and under Statutes enacted for the purpose of making it effective, a sovereign may not deny an accused person a speedy trial even though he is incarcerated in one of that sovereign's penal institutions under a prior conviction and sentence.

"The constitutional right to a speedy trial is unqualified. Once the accused is known and steps are taken to commence a criminal action to control his person and his liberty, the state may not sit idly by while defendant is incarcerated under a prior conviction."
State vs. Milner, 149 N. E. (2d) 189
"Delaying the indictment and the trial on one offense after another, until time is served on each consecutively and served under circumstances is a denial of a speedy trial. It requires no intellectual gymnastics to see such a plan designed to indefinitely extend the punishment and postpone the liberty of an individual is a violation of constitutional rights.
"The exercise of such control over a form of installment punishment compounded by detainers is a usurpation of the power of the Court, of the jury and of the Parole Board, to determine guilt and punishment under the indeterminate sentence of law. Whether consecutive or concurrent sentences should be imposed for more than one offense rests exclusively with the Court and it cannot be assumed by any other agency."
State of Ohio vs. Waites et al., 9 O. O. (2d) 506
"The general rules followed in the majority of the states and in the Federal Courts is that under a constitutional provision guaranteeing to accused a speedy trial and under statutes supplementing the constitutional provision and enacted for the purpose of rendering it effective and prescribing the time within which accused must be brought to trial after indictment, a sovereign may not deny an accused person a speedy trial even though he is incarcerated in one of the sovereign's penal institutions under a prior conviction and sentence in a Court of that sovereign."
State ex rel Lotz vs. Hover, 21 O. O. (2d) 332
"Defendant, in penitentiary, is entitled to speedy trial of pending indictments."
Article I, Section 10 Constitution Page 495
"The question of a speedy trial involving the circumstances surrounding the case, as hereinbefore outlined, since no hard and fast rule for determining the question is provided in the Constitution, becomes a matter of judicial determination. There is no limitation fixed

by law for bringing a person to trial while serving a term in the penitentiary for another offense. It would seem, therefore, that the question is whether or not the trial Court was manifestly wrong in finding that a speedy trial was not being denied under the circumstances and within the meaning of the Constitution." (Court set matter for trial after overruling Motion to Dismiss. Court was agreeable to set case for trial immediately.)
Shafer vs. State of Ohio, 43 O. A. 493

The third issue to be resolved in the present case before the Court is if a prisoner in the sovereign's own penal institution has a right to a speedy trial when demanded, may an accused in a Federal Penitentiary also demand a speedy trial although while so incarcerated he is outside of the sovereign's territory?

Although the writer has made a search of the Ohio cases, he cannot find one Ohio case on this point. The Defendant indicted in Ohio was demanding a speedy trial while incarcerated in a United States Penitentiary located at Lewisburg, Pennsylvania. It could always be claimed that while he is incarcerated outside the state through his own wrong the State of Ohio owes him no duty, or if the State of Ohio owes him a constitutional guarantee to a speedy trial, it need not go through any difficulty to assume such guarantee.

While the Ohio Courts have not spoken concerning this situation, many other states have, as well as Federal Courts.

"Federal prisoner must look to Habeas Corpus Ad Prosequendum proceedings as a means of seeking speedy trial or dismissal of state prosecution for failure to grant speedy trial."
Auten vs. State of Oklahoma, 377 P. (2d) 61
"Federal prisoner against whom state does not institute removal proceedings aimed at bringing him to trial on the state charges may assert, at any time when

state trial ultimately takes place, alleged denial of right to speedy trial resulting from state's failure to press for early removal, and may have examined at that time any alleged prejudice resulting from state's delay."

State of Minnesota vs. Hall, 123 N. W. (2d) 116

"The fact that a federal convict indicted in a state Court must remain in the custody of a Federal Agent during his trial in the state Court, does not deprive the state Court of jurisdiction to try him, since he is present in the state Court and can conduct his defense as effectively as if he were in custody of officers of that Court."

Cato vs. Smith, 104 F 2d. 885

"Failure to bring defendant to trial until 1956 for housebreaking and robbery allegedly committed in 1950, was a denial of constitutional rights to speedy trial and required reversal in view of weakness of evidence though delay was caused by imprisonment of defendant in New York for another offense, in absence of showing of reasonable effort by government to obtain defendant's return for trial.

"Court indulges every reasonable presumption against waiver of fundamental constitutional rights and does not presume acquiescence in loss of fundamental rights."

Taylor vs. U. S., 238 F 2d. 259

"The Writ of Habeas Corpus Ad Prosequendum is used to bring a prisoner incarcerated under sentence of a Federal or State Court to trial for alleged violation of laws of other sovereignty. 28 USCA Sec. 2241 (C-5)."

United States vs. Kipp, 232 F 2d 147

28 United States Code Annotated, Section 2241 (C-5)

Writ of Habeas Corpus may issue:

"It is necessary to bring him into court to testify or for trial."

"Fact that defendant, for whom there was a delay of 17 months between date of indictment and arraignment, had been taken into custody prior to indictment and held in Federal detention headquarters awaiting

disposition of certain Federal charges, afforded neither explanation nor excuse for delay, since he could have produced in state Court upon request, provided only that he was returned to Federal custody, 18 USCA Sec. 4085."

People vs. Piscitello, 165 N. E. (2d) 849

18. United States Code Annotated Section 4085. Transfer for State Offense—Expense.

Section 4085 (A)—"Whenever any federal prisoner has been indicted, informed against or convicted of a felony in a Court of record of any state or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor on the executive authority thereof and upon the presentation of a certified copy of such indictment, information or judgment, prior to his release to be transferred to a penal or correctional institution within such state or district...

"The expense of personnel and transportation incurred shall be chargeable to the appropriation for the 'Support of United States Prisoners'."

"Proceedings on motion to compel immediate trial or alternatively dismissal of indictment. The Camden County Court denies the Motion and the defendant appealed. The Superior Court, Appellate Division, Foley, J. A. D. held that fact that procedure whereby state, filing detainer with Federal Government might obtain release of prisoner for trial in state Court was expensive to state did not entitle state to avail bringing him to trial on indictment until expiration of Federal sentence."

"That procedure whereby state filing detainer with Federal Government might obtain release of prisoner for trial in state was expensive to state did not entitle state to avoid bringing him to trial on indictment until expiration of Federal sentence."

State of New Jersey vs. Patton, 184 A 2d. 655

The Court of Appeals, from its opinion feels that the Defendant herein was denied a speedy trial under his Constitutional rights to the same. However, (page 4 of opinion)

the Court feels that if a constitutional right is violated the Defendant must proceed further and show that this violation of a constitutional right operated in such a manner as to prejudice him in his defense.

Constitutional Rights Are Unqualified Rights and any Violation of the Same Is in and of Itself Prejudicial to the Person Whose Rights Have Been Violated.

> "Delaying the indictment and the trial on one offense after another, until time is served on each consecutively and served under circumstances described is a denial of a speedy trial. It requires no intellectual gymnastics to see that such a plan designed to indefinitely extend the punishment and postpone the liberty of an individual is a violation of constitutional rights.
> "The exercise of such control over a form of installment punishment, compounded by detainers, is a usurpation of the power of the court, of the jury, and of the parole board to determine guilt and punishment under the indeterminate sentence law. Whether consecutive or concurrent sentences should be imposed for more than one offense rests exclusively with the court and it cannot be assumed by any other agency. The questions as to whether witnesses are alive, available for defense, or have any recollection of the facts, may be considered by the court as some of the reasons for the existence of the constitutional provision, but they are not necessarily determinative, particularly in a county where the criminal docket is current and cases are assigned and disposed of within a period less than a single term unless the defendant obtains a continuance. *The Constitutional Right to a Speedy Trial Is Unqualified.* Once the accused is known and steps are taken to commence a criminal action to control his person and his liberty the state may not sit idly by while the defendant is incarcerated under a prior conviction."
> *State vs. Milner, 6 O. O. (2d) 206.*
> "Constitutional provision that justice shall be administered without delay guarantees a speedy trial to every defendant in a criminal case."

"The right of an accused person to a speedy trial is fundamental and not subject to judicial discretion."
State vs. Kuknhausen, 266 P 2. 698

"The speedy trial guarantee preventing undue delay between the time of indictment and trial serves a threefold purpose. It protects the accused, if held in jail to await trial, against prolonged imprisonment, it relieves him of the anxiety and public suspicion attendant upon an untried accusation of crime, and finally, like the statute of limitations, it prevents him from being 'exposed to the hazard of a trial after so great a lapse of time' that the 'means of proving his innocence may not be within his reach' as for instance by the loss of witnesses or the dulling of memory.

"While the first two considerations noted above may not loom large in the case of a defendant in prison for another offense, there can be no dispute that it is vital, even for him that the trial be had while witnesses are available and memories fresh."
People vs. Prosser, 130 N. E. (2d) 891

"The right of a speedy trial is granted by the Constitution to every accused. A convict is not excepted. He is not only amenable to the law, but is under its protection as well. No reason is perceived for depriving him of the right granted generally to accused persons, and thus in effect inflict upon him an additional punishment for the offense of which he has been convicted. At the time of defendant's trial upon the one information, he was under the protection of the guaranty of a speedy trial as to the other. It cannot be reasonably maintained, we think, that the guaranty became lost to him upon his conviction and sentence or his removal to the penitentiary. Possibly in his case, as well as in the case of other convicts, a trial might be longer delayed, in the absence of a statute controlling the question, than in the case of one held in jail merely to await trial without violating the constitutional right, for an acquittal would not necessarily terminate imprisonment. However, the purpose of the provision against an unreasonable delay in trial is not solely a release from imprisonment in the event of acquittal, but also a release from the harrassment of a criminal prosecution

> and the anxiety attending the same; and hence an accused admitted to bail is protected as well as one in prison. Moreover, a long delay may result in the loss of witnesses for the accused as well as the state, and the importance of this consideration is not lessened by the fact that the defendant is serving a sentence in the penitentiary for another crime."
> *State vs. Keefe, 17 Wyo., 227, 257*

State Cannot Say It Was Injured by Delay in this Case Because the Defendant Asked To Be Tried and the Prosecutor Could, at Any Time, Have Had the Case Placed on the Calendar for Hearing.

It should be noted that in the case of *Shafer vs. State,* the Defendant had been indicted while in the case at bar the detainer was placed merely on the filing of an affidavit. In the Montgomery County case (*State vs. Milner,* 6 O. O. (2d) 206) however, the Defendant was also held on an affidavit only, and that case is, therefore, similar to the present in every detail, the only apparent difference being that in *State vs. Milner* the trial was delayed twenty-eight months while in the present case the delay has been approximately thirty months.

If the Court is of the opinion that the case of *State vs. Milner* contains a correct statement of the law, the appeal of the Defendant should be sustained and this case be dismissed and the discharge of the Defendant ordered.

The Court of Appeals relies on *Taylor vs. U. S.,* 238 F. (2d) 259. This case is distinguished in that although the Court stated it considered the weakness of this particular case as a factor in the denial of a speedy trial (although defendant was convicted). The Court at page 262 stated,

> "We do not wish to be understood to do other than apply the rule stated to the facts and circumstances of this particular case."

THE QUESTION IS SUBSTANTIAL

It seems appropriate to recite the old maxim, "Justice delayed is justice denied." It is patent and palpable that the resources of the state are enormous when compared to those of an individual. In this instance, the appellant was not at liberty during the time of delay to see to it that his defense witnesses and defense evidence were carefully preserved and kept alert on a standby basis. As a matter of fact, it is even in the interest of society in the course of protecting itself that a speedy trial be had in order that the state's own witnesses and evidence be promptly employed for the purpose of proceeding with the prosecution. It therefore is in the interest of all parties that the constitutional mandate of a speedy trial be observed. Due process cannot be had by either party, be it the sovereign or the individual if three years or more elapse between the time an action arises and the time a trial is had. A 1965 decision of the Supreme Court of Ohio, *Cunningham v. Haskins*, 3 O.S. 2nd 86, 209 N.E. 2d 211, involved a question raised by a party who claimed that his arrest in April, indictment in August, and his trial in December of 1963 deprived him of his contitutional guarantee of a speedy trial. Naturally, this appellant lost since the court held that he did indeed get a speedy trial. Yet this case demonstrates that the appellant in *Cunningham* felt that even though the time from arrest to trial was eight months, the question seemed of some merit as to whether there had been the proper degree of speed in the process of the law. Even so, Judge Paul J. Herbert of the Supreme Court of Ohio, dissented in this very case and while this was but one vote out of seven, it must be pointed out that Judge Herbert prior to ascending the bench, was probably among the very best of criminal law practitioners in the State of Ohio. It must further be pointed out that the appellant, *Cunningham*, at no time had requested that his trial be begun but in the

instant case, the herein appellant repeatedly asked that he be given his day in court.

Representative goverment is founded on a principle of abhorrence of extremes. Just as the founding fathers were revolted at the thought of summary justice, star chamber proceedings, or other procedures that precluded any degree of deliberation and proper consideration, so did they also bitterly resent protracted delays that would preclude a fresh presentation of all of the facts on both sides of a case. Since the herein appellant was in a Federal Institution during the time of delay, it is understandable that less sympathy might attach to his status, but should that be the case in this instance? Must not justice be dispensed to all parties irrespective of sympathy or antipathy? Why else is the Goddess of Justice constantly depicted with a blindfold shielding her eyes?

What was once called the American experiment in government might now well be called the American experience in government for it has been learned that, as Gladstone put it, "The United States Constitution is the greatest work ever struck by the hand of man." That utterance of almost a century ago has been confirmed in one succeeding year after another. In a few months, the United States of America will begin its One Hundred Ninety First year of existence and the reaffirmation of the celebration of freedom heretofore enjoyed could be accomplished by the allowance of the within appeal and a reversal of the positions of the prior courts.

Respectfully submitted,

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STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOHN CIESIELSKI,
Defendant-Appellant.

OPINION
Case No. 842

Appearances

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Avetis G. Darvanan, Youngstown, Ohio, for Defendant-Appellant.
Hon. Paul W. Brown,
Hon. James G. France,
Hon. George M. Jones, JJ.

Dated: June 3, 1964

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.
France, J.

Defendant was tried, convicted and sentenced in Court of Common Pleas on two counts, the first for burglary and the second for larceny of narcotics, both arising out of entry into a drug store during the night of June 19, 1960.

Defendant was apprehended on the same night by police, following a high speed chase by cruiser from the vi-

cinity of the scene of the crime. His car was wrecked during the case and an alleged confederate escaped.

He was charged in municipal court, bound over to grand jury, and released on bail as set by Common Pleas Court pending grand jury indictment. While free on bond he went into Pennsylvania and there committed crimes for which he was sentenced by federal authorities to confinement in federal prison in Pennsylvania, and thereafter taken by the Commonwealth of Pennsylvania to Pittsburgh for trial and conviction on a state charge. Meanwhile Columbiana County authorities filed detainers against him with the Federal Warden.

Commencing September 28, 1960, through February 17, 1962, defendant wrote letters to the Prosecutor of Columbiana County asking that the charges against him be disposed of while he was in federal confinement. When no action was taken on September 1, 1961, he field motion to show cause why a writ of habeas corpus ad prosequendum should not issue to bring him to trial in Ohio while a federal prisoner in Pennsylvania. The prosecutor resisted such attempts by defendant to initiate his removal to Ohio for trial and the motion was overruled.

Thereafter defendant on May 15, 1962, moved to quash and dismiss the indictment for the reason that he had been denied speedy trial. This motion was overruled by the trial judge.

Upon termination of his federal and commonwealth of Pennsylvania sentences defendant came to Ohio where he was on May 24, 1963, arraigned and thereafter on July 30, 1963, placed on trial.

Three errors are assigned. The first relates to claimed denial of defendant's constitutional right to a speedy trial. (Article I, Section 10, Ohio Constitution.) The state defends against this claim first on the ground that defendant

did not make clear enough that he wanted trial. On the record we find this defense utterly without merit. The accused need not, at his peril, use the exact legal phrases required. It is sufficient that he make known his whereabouts, condition and his desire that something be done about the indictment. *State ex rel Lotz v. Hover,* 174 Ohio St. 68; *State v. Milner,* 149 N. E. (2d) 189 (Common Pleas, Montgomery County); *State v. Waites,* 9 Ohio Opinions (2d) 506 (Municipal Court, Akron).

It is also claimed that the defendant, at the time, sought the wrong remedy and that a state court had no jurisdiction in habeas corpus over a federal warden in another state. The trial judge so found in overruling defendant's motion. Whatever the truth of this proposition, it is unavailing as a device to block the defendant's desire in the face of a showing, as in this case, that the federal authorities are willing (Defendant's Exhibit 5) to overlook such technical objections and to make the defendant available for trial. Whether the machinery for producing the defendant lay by writ of habeas corpus ad prosequendum [*State v. White,* 260 Pac. 647 (Oklahoma)] or an application to the executive authority by the state (Title 18, Section 4085, U. S. C.) or a combination of the two need not be decided here. It is probable that the federal authorities would have imposed no barrier by objection to territorial jurisdiction. See *Carbo v. United States,* 364 U. S. 611, 81 S. Ct. 338, 5 L. Ed. (2d) 329; *United States v. Kipp,* 232 Federal (2d) 147; *Taylor v. United States,* 238 Federal (2d) 259.

The reasons for denying defendant's request, as given by the prosecutor and stated in the court's ruling of September 22, 1961, were insufficient and the failure of the

trial judge either to grant defendant's motion for writ, or alternately to require the prosecutor to initiate some efficacious request for defendant's presence, was error.

But this is not the error complained of! It is claimed that, as a result of failure to grant defendant's motion, the trial court was under obligation to quash the indictment. We do not think this necessarily follows. While defendant has a right to speedy trial, denial of that right, while he is held by another soverign, requires reversal of his conviction only if failure to grant it would operate to prejudice him in his defense. Thus in *Taylor v. United States*, 238 Federal (2d) 259, the court stated:—

> "* * * Nor can it be said that the lack of a speedy trial did not harm appellant, for the possibility of serious prejudice existed here under circumstances disclosing a 'weak' case. Had the evidence been overwhelming, so that no infirmity might be made to appear, a different result might be reached. *Berger v. United States*, 1935, 295 U. S. 78, 88-89, 55 S. Ct. 629, 79 L. Ed. 1314. The long lapse of time between the commission of the offenses and the trial, the incarceration of appellant throughout the entire interim, and the resulting handicap to the procurement of witnesses who might have supported appellant's alibi, or any other defense, must seriously have handicapped the preparation of a defense. * * *
>
> "* * * It is the combination of the factors set forth above which motivates our decision. We do not wish to be understood to do other than apply the rule stated to the facts and circumstances of this particular case."

We are thus led to a consideration of whether or not relative to the prosecution defendant was, or could logically have been, handicapped in marshalling his defense.

In this connection defendant claims the death of his wife and his alleged confederate as making their testimony in

his behalf impossible to produce. But defendant never proffered what the nature of the exculpatory evidence might be. Alibi was improbable; corroborating an innocent involvement of defendant in the confederate's sole crime is almost too far out; it strains the credulity.

But vis-a-vis the defendant, the state's delays in getting to trial were most harmful to its case. One of the officers engaged in the chase died before trial. One of the lieutenants in charge of the East Liverpool Police Department's evidence locker, who had been an eyewitness to the start of the chase, also died, and apparently something happened to the alleged narcotics stored in this locker which prevented their production and identification at trial. In addition, a helpful bystander "Joe Ross", who helped the police by gathering the loot tossed out of a speeding car, strangely disappeared without trace, thus creating a hiatus in the proof of chain of custody of this evidence. Seldom perhaps has a prosecution been so seriously handicapped by the product of its own delay. Thus if there was prejudice at trial resulting from delay this prejudice operated much the more strongly against the state than against defendant.

For these reasons we find that appellant's first assignment of error is not well taken.

Defendant's second assignment relates to the admission of a suitcase allegedly thrown from defendant's car during the chase. It apparently lay in the road, after being run over by the pursuing cruiser, while the police were occupied in guarding defendant and unsuccessfully pursuing a second occupant of the pursued vehicle. A Joe Ross was sent by the officers to pick it up and bring it to them. As the surviving arresting officer testified, it contained some tools, a rope and a "sack of narcotics". Joe Ross disappeared without a trace pending trial.

The objection to introduction of the suitcase and contents is based on the fact that it involves the silent hearsay testimony of Joe Ross that this was the same suitcase and contents as he found in the road, neither policeman having witnessed or assisted with its retrieval. We do not believe there is implicit in the testimony concerning the retrieval of the suitcase any such unsworn testimony. *A* suitcase was thrown, *a* suitcase was presented to police by Joe Ross after the police requested that he retrieve it, and all within ten minutes of the time it was thrown. There are, of course, possibilities of substitution or of fabrication or "planting" of items in it, but it must be remembered that all this occurred after 3:00 a.m. on a sparsely settled stretch of road with only one other person besides police and the accused in the area. The possibilities of tampering or of substitution went to weight and not to admissibility and there was no error in admitting the suitcase and its marked and identified contents into evidence for, as the trial judge aptly stated, "what it was worth". See *State v. Pontery* (New Jersey) 117 Atlantic (2d) 473, *Peoples v. Gierens* (Illinois), 81 N.E. (2d) 164, *People v. Cullen* (Cal. App.), 234 Pacific (2d) 1, *White v. United States*, 200 Federal (2d) 509.

However, the state went beyond this point and offered testimony by Officer Garvey as to a "sack of narcotics" being in the suitcase although no such item was offered into evidence, nor was its absence in any way accounted for. "*Permitting such an unsupported conclusion to be palmed off on the jury as fact was error highly prejudicial to defendant.*" This was compounded by permitting the manager of the robbed drug store, who was not a licensed pharmacist, to testify that several bottles missing from the

drug store after the break-in contained narcotics because the labels on the bottles said so. It seems almost incredible that the contents of the bottles, said to have been in police custody, were apparently never tested and even more incredible that they should have disappeared, as apparently they did, from the police evidence locker pending trial. The manager's testimony was both clear hearsay and a conclusion as to an essential fact by one who was unqualified to offer it. Admission of all testimony relative to narcotics was error prejudicial to defendant.

The third assignment of error relates to failure to direct a defendant's verdict for failure of proof. As to the first count in the indictment—burglary—there was abundant proof of corpus delecti, of defendant's identification on the scene and of his flight, even without admission of the contents of the suitcase which contained burglar tools. As to this count the motion for directed verdict was properly overruled.

But the second count charged, not just larceny, but larceny of narcotic drugs. It was thus essential to the state's case that it prove asportation of some item defined in Section 3719.01 (L), Revised Code, as such. There was, as observed before, not a shred of competent evidence on this point. The store manager could not, with certainty, testify that any narcotics were removed at the time in question. His testimony that he saw them later at the police station (presumably with other contents as part of the "sack of narcotics" recovered in the suitcase) is without value in the absence of qualification to give an opinion on that subject and in the further absence of testimony accounting for the failure to produce the alleged narcotics at trial.

There being complete failure of proof as to an essential element in the second count, the defendant is entitled, as a matter of law, to acquittal on that count. Finding that he was properly convicted on the first count we remand the cause to the court of common pleas for discharge of defendant on the second count and for resentence on the first count alone.

BROWN, P. J., Concurs.
JONES, J., Concurs.

APPROVED:

JAMES G. FRANCE,
Judge.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

JOHN CIESIELSKI,
Defendant-Appellant.

No. 39049

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for Columbiana County

It is ordered by the Court that this motion is overruled. Costs:

Motion Fee, $20.00, paid by ....Avetis G. Darvanan....

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.....

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .... day of ..... 19....

..... *Clerk*

..... *Deputy*